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The Class Action Fairness Act of 2005: The Limits of its Text and the Need for Legislative Clarification, Not Judicial Interpretation

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THE CLASS ACTION FAIRNESS ACT OF 2005: THE LIMITS OF ITS TEXT AND THE NEED FOR LEGISLATIVE CLARIFICATION, NOT JUDICIAL INTERPRETATION

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THE CLASS ACTION FAIRNESS ACT OF 2005: THE LIMITS OF ITS TEXT AND THE NEED FOR LEGISLATIVE CLARIFICATION, NOT JUDICIAL INTERPRETATION

KRISTEN L. WENGER*

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I. INTRODUCTION

*“She brought a small town to its feet and a huge company to its knees.”*¹

This is the tagline of the blockbuster movie *Erin Brockovich*, a true story of how a single mother recovered an enormous settlement on behalf of a victimized rural town. It portrays the conventional view that class action lawsuits frequently pit the successful underdog against the powerful and greedy corporation.

However, the history and development of class action litigation in the United States has been much less idealistic and straightforward. There has been an enormous amount of debate regarding reform for both the allegedly underdog plaintiffs and the mighty corporations. These discussions have resulted in the passage of several pieces of legislation. The most recent was the culmination of much legislative debate, the Class Action Fairness Act of 2005 (CAFA).

* J.D. 2011, Florida State University College of Law; B.A. 2006, University of Georgia. I am grateful to my parents for all of their love and support throughout the years, and to Professor Tara Grove for her insightful input and teaching me that statutory interpretation can, in fact, be a very interesting topic. Thank you also to all of my friends, including Lauren Morrisette for her many pearls of “wisdom”; my mentor, John Marino; and the editors of *Florida State University Law Review*.

1. ERIN BROCKOVICH (Jersey Films 2000).

On February 18, 2005, the 109th Congress passed CAFA, and it was signed into law by President George H.W. Bush.² The nearly immediate result was a broad overhaul of the manner in which class action lawsuits are litigated and resolved. The primary changes included the following: (1) increased judicial scrutiny of proposed “coupon settlements” and notice provided to litigants, (2) the significant expansion of diversity jurisdiction, (3) jurisdictional exceptions for when a federal district court must and may refuse to accept a class action case, (4) appellate procedures for dealing with remand orders, and (5) the implementation of a monitoring system to be put in place to hold practitioners and the judiciary accountable for its disposition of class action lawsuits.

These changes have had, and will continue to have, an enormous impact on the field of class action litigation. They have evoked mixed reactions from practitioners, academic commentators, and the judiciary. When Congress initially began to consider a proper vehicle for reform, the foremost concerns involved the need to alleviate the abusive practices of plaintiffs’ attorneys receiving excessive fees and ensure that more adequate representation would be provided to class members.³ However, that focus began to shift as discussions progressed and the focus turned to “forum shopping.”⁴ This practice occurs when class members seek the most promising state court forum and attempt to avoid the federal forum by adding diversity-destroying parties or bringing claims where individual class member damages are below the threshold required for diversity jurisdiction.⁵ The Senate Judiciary Report noted that this practice results in the inconsistent treatment of similar litigation, which frequently contravenes basic fairness and due process considerations.⁶ Others have expressed additional concerns as to whether a shift from individual lawsuits to a group pursuit of justice tends to deprive a litigant of having his well-established “day in court.”⁷

These abusive practices did not just emerge in recent years. Moreover, the large settlements or jury verdicts achieved by class plaintiffs have adversely affected consumers because the expense is eventually passed on in the form of rising costs. These rising costs

2. Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2006). Courts have consistently upheld the February 18, 2005 effective date. *See, e.g.*, *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 684 (9th Cir. 2005); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094 (10th Cir. 2005); *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005).

3. Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1594-95 (2006).

4. *Id.* at 1595.

5. Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1854 (2008).

6. *See* S. REP. NO. 109-14, at 29-30 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 28-29.

7. *See* *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

have played a major role in the significant amount of public discontent, along with a general distrust for the legal system, which has continued to proliferate and resulted in attempts at reform by previous legislatures.⁸

The Senate Judiciary Committee has conducted hearings focused on similar legislation since the late 1990s. In 2003, Federal Rule of Civil Procedure (FRCP) 23 was amended to reflect CAFA's focus on reforming the class action process. The amendments dealt with four main areas: (1) the timeline for certification decisions and notice, (2) judicial oversight of class action settlements, (3) the appointment of class counsel, and (4) the compensation structure for class counsel.⁹ Although the amendments to FRCP 23 were noted as progress in the right direction, further reform was needed.

In 2001 and again in 2003, legislation for a Class Action Fairness Act was proposed, but both failed to receive adequate votes in the House and Senate to become law.¹⁰ Both versions had attempted to implement the following changes, most of which were later incorporated into CAFA: the establishment of a consumer class action bill of rights dealing with settlements and compensation for class counsel, the expansion of federal diversity jurisdiction over any civil action in which the aggregate amount of the claims exceeds \$2 million, the abrogation of the requirement for complete diversity between the class members and all defendants, and provisions for carve-outs from federal jurisdiction for local controversies.¹¹

CAFA is the culmination of ongoing reform efforts and legislative debates. It addresses the many criticisms of the class action process as it existed prior to its passage. However, there has been controversy surrounding the interpretation and application of specific portions of CAFA. The controversy is largely the result of alleged disparities between the plain language of CAFA and the legislative history supporting it.

To date, there have already been a number of cases dealing with these disparities and the effect they have had on the application of the new procedures. These cases have, in some situations, resulted in inconsistent treatment by various courts, which is in direct

8. See, e.g., CONG. RESEARCH SERV., S. 2083 CLASS ACTION FAIRNESS ACT OF 1998 (1998), <http://www.govtrack.us/congress/bill.xpd?bill=s105-2083>; CONG. RESEARCH SERV., S. 353 CLASS ACTION FAIRNESS ACT OF 2000 (2000), <http://www.govtrack.us/congress/bill.xpd?bill=s108-2062>.

9. FED. R. CIV. P. 23(c), (e), (g), (h).

10. See, e.g., CONG. RESEARCH SERV., S. 1712 CLASS ACTION FAIRNESS ACT OF 2001 (2001), <http://www.govtrack.us/congress/bill.xpd?bill=s107-1712&tab=summary>; see also CONG. RESEARCH SERV., S. 1751 CLASS ACTION FAIRNESS ACT OF 2003 (2003), <http://www.govtrack.us/congress/bill.xpd?bill=s108-1751&tab=summary>.

11. See, e.g., CONG. RESEARCH SERV., S. 1712 CLASS ACTION FAIRNESS ACT OF 2001 (2001), <http://www.govtrack.us/congress/bill.xpd?bill=s107-1712&tab=summary>.

contradiction with the stated purpose of CAFA “to assure fair and prompt recoveries for class members with legitimate claims.”¹² Only time will tell whether there will be a need for the United States Supreme Court to interpret the key provisions that are providing so much room for interpretation, or if Congress will be able to adequately intervene by passing corrective legislative measures.

This Note discusses the dispute between two schools of statutory interpretation as they apply to CAFA: textualists, who adhere to the plain language of CAFA, and purposivists, who consult the legislative history in order to ascertain Congress’s intent and purpose to resolve any ambiguous provisions. Part II provides a history of class action litigation and a brief description of previous attempts at mass tort reform. Part III provides an overview of the Class Action Fairness Act of 2005. Part IV discusses a few primary ambiguous provisions and how they have been handled by courts since CAFA’s enactment in 2005, including a discussion of the textualist and purposivist perspectives. Part V concludes by recommending that, in order to reconcile the purposes of CAFA and the underlying sentiments expressed in legislative materials, courts should adopt a textual approach when interpreting CAFA and allow Congress to enact corrective legislation to resolve any significant ambiguities.

II. THE HISTORY OF CLASS ACTION LITIGATION

A. *Becoming a Massively Powerful Tool for Litigators*

Although class action litigation began in common law England as representative lawsuits, it was not until the 1800s that this method became available to litigants in the United States.¹³ The first federal group litigation provision, Equity Rule 48, was passed in 1842 and served as an exception to the compulsory joinder rule that had been imported from England.¹⁴ It has been noted that fundamental changes occurred when Federal Equity Rule 38 succeeded Equity Rule 48 in 1912, because representative suits were then permitted when there were simply too many parties to join and absent parties could finally be bound by the final judgment.¹⁵

The twentieth century ushered in an era of massive procedural reform in American law. Class actions were one device in particular need of improvement. A leading legal scholar of that time, Zechariah

12. S. REP. NO. 109-14, at 30.

13. 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 1:9 (4th ed. 2002).

14. See Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1091 (1980); CONTE & NEWBERG, *supra* note 13, § 1:9.

15. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 804 (Bankr. E.D.N.Y. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992).

Chafee, helped bring this issue to the forefront after publishing an essay that advocated for class actions as a judicially economical tool that required further reform.¹⁶ However, Chafee went on to formulate a fundamental question: “whether the mere existence of multiple parties with parallel legal claims or defenses was sufficient to create equitable jurisdiction, or whether an additional, independent equitable factor (such as prayers for injunction or for the rescission or cancellation of instruments) was necessary.”¹⁷ Chafee completed a thorough analysis that began with the occurrence of bills of peace being used to settle disputes between tenants and lords along with parishioners and vicars, before concluding that “[f]rom such a bill of peace it was a natural step to the representative suit.”¹⁸ In order to take into account the focus on judicial economy while balancing the growing concern for litigants’ autonomy, the drafters of FRCP 23 permitted (but neither required nor motivated) individual members of the class to organize.¹⁹

The initial version of FRCP 23 was significantly similar to the former Equity Rule 38 and attempted to categorize class suits in terms of jural relations between parties.²⁰ The 1938 version of FRCP 23 had three designations for class suits.²¹ The first two designations, true and hybrid, were considered narrow and required a “joint” or “common” interest, or a “several” interest in a specific property, respectively.²² The third, which was known as the spurious action, had a far broader reach and required only a common question of law or fact and common relief.²³ The primary focus was that there had to be a notion of privity or unified interest between the parties making the claim.²⁴

Professor Moore, who was a principal drafter of the original Rule 23, helped clarify the extent to which the judgment was binding on the parties because the preliminary draft of the rule itself was silent on the issue.²⁵ A sliding scale of binding effect was proposed and

16. Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932).

17. Yeazell, *supra* note 14, at 1099 (citing ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 156 (1950)).

18. Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 868 (1977) (quoting CHAFEE, *supra* note 17, at 200-01).

19. Yeazell, *supra* note 14, at 1102.

20. CONTE & NEWBERG, *supra* note 13, § 1:9.

21. FED. R. CIV. P. 23(a), 308 U.S. 689 (1939) (repealed 1966); *see also* James E. Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U. L. REV. 407, 463 (1969).

22. *See* Starrs, *supra* note 21, at 463 & n.348 (citing FED. R. CIV. P. 23(a)).

23. Starrs, *supra* note 21, at 464.

24. Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 615 (1971).

25. *See* James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571 (1937).

widely accepted by most courts: the judgment would bind all members of a true class action and all appearing parties, and would be conclusive as to all claims concerning the property in a hybrid class action, and bind only the appearing parties in a spurious class action.²⁶ Numerous difficulties arose as courts attempted to fit class action lawsuits within one of these categories, and many parties disputed the judgment's binding effect. As a result, FRCP 23 was completely rewritten when it was amended in 1966.²⁷

After the 1966 amendments, FRCP 23 set forth more practical requirements for when a class action may be initiated and eliminated the concept of a jural relationship.²⁸ The four preliminary requirements for certification that apply to all class actions are numerosity, commonality, typicality, and adequate representation.²⁹ Subsection (b) added further requirements based on functional distinctions, such as the relief sought or whether all necessary interests would be represented without aggregating the claims.³⁰ The provision that provided the most resounding change was clearly subdivision (b)(3). It provided that a class action may be brought when the prerequisites of Subsection (a) are met, the court determines that questions of law or fact common to members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.³¹

That version of FRCP 23 drastically changed the playing field and was the source of a dramatic increase in class action litigation that began in 1966.³² No longer were parties required to be connected by united interest or privity so long as there was a common factual or legal issue. This new rule allowed completely unassociated people to come together and make a claim that resulted in a case of considerable stature.³³ The most powerful element of the amended rule was that judgments had a binding effect on all class members rather than being limited to those who actually participated directly in the litigation.³⁴ Furthermore, this new device benefitted plaintiffs because litigation of relatively minor claims "afford[ed] aggrieved persons a remedy when it [was] not economically feasible to obtain

26. *See id.*

27. CONTE & NEWBERG, *supra* note 13, § 1:9.

28. *Id.* § 1:10.

29. FED. R. CIV. P. 23(a).

30. *See* CONTE & NEWBERG, *supra* note 13, § 3:1.

31. FED. R. CIV. P. 23(b); *see also generally* CONTE & NEWBERG, *supra* note 13, § 1:10.

32. James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 401 (2004).

33. Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness"*, 58 SMU L. REV. 1313, 1315-17 (2005).

34. CONTE & NEWBERG, *supra* note 13, § 1:10.

relief through the traditional framework of multiple individual damage actions as, for example, when each claim involve[d] only a small dollar amount.”³⁵

B. Procedural Questions Arise as Class Actions Proliferate

Although class actions were originally intended for civil rights litigants to use in combating segregation, courts transitioned from hostility and skepticism to greater acceptance for certifying classes with claims that were well outside that initial scope.³⁶ The 1966 amendments to FRCP Rule 23 were largely to blame for the increased amount of large, multistate class action cases, which grew out of the amendments’ innovative and expanded version of class actions based on “ ‘common issues’ of law and fact.”³⁷ However, the Supreme Court handed down three decisions in the 1970s that deterred these cases from being filed in federal court and, in fact, made it very difficult for these cases to be litigated in federal court at all.³⁸

The first case interpreted the federal diversity statute to require complete diversity, meaning no class member could be the resident of a state in which any defendant, whether an individual or corporate entity, resides. Every class member had to meet the statutory jurisdictional amount,³⁹ which is currently \$75,000.⁴⁰ Soon after, the Court held that FRCP 23(c)(2) required individual notice to class members in a FRCP 23(b)(3) damages claim and that during the litigation, the plaintiff must bear the exorbitant cost of providing such notice.⁴¹ Finally, the Court found that the “final decision” statute governing appellate jurisdiction did not permit interlocutory review of class certification decisions,⁴² which resulted in remand decisions having to wait until after final disposition before they could be reconsidered. Those three decisions essentially closed the federal courthouse doors to most class action lawsuits.

Although the doors to the federal courthouse had effectively closed to a great majority of class actions, the doors to the state courts did not readily swing open. Many state courts questioned whether they could properly exercise personal jurisdiction over unnamed plaintiffs

35. 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 23.02 (Daniel R. Coquillette et al. eds., 3d ed. 1997) (citing cases).

36. See S. REP. NO. 109-14, at 7 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 7.

37. Purcell, *supra* note 5, at 1851 (quoting FED. R. CIV. P. 23(b)(3)).

38. Andrews, *supra* note 33, at 1318.

39. Zahn v. Int’l Paper Co., 414 U.S. 291, 296 (1973) (citing Steele v. Guar. Trust Co. of N.Y., 164 F.2d 387, 388 (2d Cir. 1947)).

40. 28 U.S.C. 1332(a) (2006).

41. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 177 n.14 (1974).

42. Coopers & Lybrand v. Livesay, 437 U.S. 463, 464-65 (1978).

in a multistate lawsuit.⁴³ Other state courts were skeptical as to whether they had the authority and ability to decide cases that involved nonlocal claims.⁴⁴ The Supreme Court, in *Phillips Petroleum Co. v. Shutts*, provided an answer to both questions posed by state courts and ultimately encouraged filings in state court.⁴⁵ This case held that a state court does not violate due process regardless of whether minimum contacts exist when it asserts personal jurisdiction over absent members of a Rule 23(b)(3) plaintiff class so long as absent members have been given an opt-out notice.⁴⁶ The Court went on to hold that there is a lesser burden on a plaintiff to travel to an out-of-state venue than on a defendant, especially when the plaintiff already has adequate representation provided by the class counsel.⁴⁷ The Court also held that a state court has the authority to exercise its discretion in a choice of law decision so long as the choice is “ ‘neither arbitrary nor fundamentally unfair.’ ”⁴⁸ An important element in the fairness analysis is whether the parties had an expectation that they would be governed by the choice of law.⁴⁹

Then, in *Sun Oil Co. v. Wortman*, the Court increased the appeal of state forums even further by refusing to review a choice of law decision in a multistate class action on the basis that the other potentially relevant state laws were sufficiently similar to those of the forum.⁵⁰ Therefore, state courts had been granted the discretionary authority to further their traditional tendency to be plaintiff-friendly forums, and plaintiffs frequently exploited this opportunity.

During this same time, federal courts consistently refused to certify class action lawsuits based on mass tort claims, primarily because the drafters of the 1966 amendment stated “that mass accident cases ‘ordinarily are not appropriate’ for class action treatment.”⁵¹ However, in light of the need for greater judicial efficiency, federal courts eventually began to look beyond that comment and consider certifying mass tort claims.⁵² Federal courts began to grant class certification for a multitude of mass tort claims, including cases involving asbestos-related claims, tobacco-related illnesses, complications that resulted from faulty silicone implants,

43. Andrews, *supra* note 33, at 1320.

44. *Id.*

45. 472 U.S. 797, 811 (1985).

46. *Id.* at 812.

47. *See id.* at 808, 811.

48. *Id.* at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

49. *Id.* at 822.

50. *See* 486 U.S. 717, 730-31 (1988).

51. Andrews, *supra* note 33, at 1325 (quoting FED. R. CIV. P. 23 advisory committee’s note).

52. *Id.* at 1325.

and alleged pharmaceutical drug contaminations.⁵³ This effort was effectively thwarted by the availability of the opt-out provision in Rule 23(b)(3) and its increased use by defendants.⁵⁴ The opt-out provision allows

[a]n unnamed member who feels it cannot be adequately represented by named defendants or by counsel for unnamed defendants [to] have the opportunity to “opt out” of the suit and not be bound by the judgment or to be represented by a lawyer of his own choice. The opportunity for exclusion is adequate protection for whatever due process rights are not satisfied by actual notice and representation by the named defendant or by counsel for unnamed defendants.⁵⁵

This provision ensured that parties who may be responsible for a considerable portion of the loss suffered by the class members were able to effectively insulate themselves from monetary liability, thus undermining a large portion of a potential settlement or verdict.

As a result, plaintiffs again took up the practice of forum-shopping to bring their claims in increasingly plaintiff-friendly state forums.⁵⁶ Multistate class actions gave state courts a great amount of power to decide issues of national importance that would significantly affect a distinctly federal issue: interstate commerce.⁵⁷ This concern was declared “‘false federalism’” by CAFA supporters and mentioned throughout the Senate and House reports in the development of CAFA.⁵⁸ However, an opposing point of view was expressed in *Sun Oil Co. v. Wortman* when the Court stated,

[t]o constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court’s attention.⁵⁹

The Supreme Court decisions encouraged ambivalence towards defendants’ constitutional right to due process. These decisions also furthered a growing problem: a lack of communication and control

53. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344 & n.2 (1995).

54. Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 94 (1997).

55. *Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974).

56. Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 EMORY L.J. 1305, 1320-26 (2000).

57. Purcell, *supra* note 5, at 1854.

58. *Id.* at 1854 & n.111 (quoting S. REP. NO. 109-14, at 62 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 57).

59. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-31 (1988).

between the class of plaintiffs and class counsel, which would result in counsel making critical representative decisions without first consulting the class members. Potential conflicts of interest began to emerge between class members as disagreements occurred as to the manner in which to resolve their claims.⁶⁰ As class members began to lose a greater amount of control over the litigation, greater opportunities began to arise for class counsel to collude with the defendants⁶¹ in settlement discussions in order to ensure the attorneys benefitted even when the class itself did not.

An additional abusive practice that became the subject of proposals for mass tort reform was the seemingly excessive fees plaintiffs' attorneys were receiving, much of which were highly disproportionate to the recovery actually received by the class.⁶² In fact, entrepreneurial plaintiffs' attorneys realized they could recover higher fees for a representative lawsuit without having to exert the same amount of effort needed if the claims were individually resolved. Then, when such opportunistic lawyers discovered that state courts provided a more lenient forum in which to litigate, class action claims against large corporations increased by more than 300% in federal courts and in excess of 1000% in state courts.⁶³ Specifically, the Senate Judiciary Committee noted that plaintiffs' lawyers have been able to "game the system" for two primary reasons: the requirement of complete diversity and the amount-in-controversy threshold.⁶⁴ It is simple for the attorneys to add a named plaintiff simply because of his or her residency, and the Committee found that it "makes little sense" to require each claimant to show an individual claim of \$75,000 when the cases frequently involve tens of millions of dollars.⁶⁵ Furthermore, these attorneys began to frequently agree to settle the classes' claims by accepting coupon settlements, which provide class members with low-value coupons to purchase the very products or services that were the basis of their initial claims, while still receiving significant monetary legal fees.⁶⁶

Critics of class action litigation have also pointed out that the propensity for plaintiffs' lawyers to file allegedly frivolous lawsuits and the potential for massive jury verdicts have generally been sufficient to force corporations into settling unfounded claims or deter otherwise honest corporations from expanding their operations.⁶⁷ Certain states had become known as "judicial hellholes"

60. Purcell, *supra* note 5, at 1852-53.

61. *Id.*

62. *Id.* at 1855.

63. See S. REP. NO. 109-14, at 13 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 13-14.

64. *Id.* at 10.

65. *Id.*

66. Sherman, *supra* note 3, at 1614.

67. Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462 (2000).

by corporate defendants, because the judges routinely certified classes of litigants when very few other jurisdictions would do so, and the juries were particularly unsympathetic to corporate defendants.⁶⁸ In particular, Madison County, Illinois admitted “that it applies ‘kind of a loose’ and ‘liberal’ policy in allowing out-of-state asbestos claimants to remain in the county[,] . . . routinely refus[ing] to dismiss or transfer such cases.”⁶⁹ Courts in Madison County have been questioned for allowing “claims to proceed to trial where the plaintiff and defendant are located out-of-state, the plaintiff’s exposure occurred outside the state, medical treatment was provided outside the state, no witnesses live in Illinois, and no evidence relates to the state.”⁷⁰

This mutation of class action claims along with a widespread increase in the abusive practices described above served as a catalyst for a renewed demand for mass tort reform. Additionally, the United States Chamber of Commerce and academic commentators attributed much of the abuse to state courts with a typically elected judiciary, which led to increased support for Congress to expand diversity jurisdiction in order to “provide a fairer and more impartial federal court forum for interstate class actions.”⁷¹ Amid much debate as to whether the motivation for the legislation was to increase protection for powerful corporations or to truly reform the system so that it may function in a fair and efficient manner, Congress’s decisive response was the Class Action Fairness Act of 2005.

III. OVERVIEW OF THE CLASS ACTION FAIRNESS ACT OF 2005 (CAFA)

According to the Senate Judiciary Committee, frequent abuses of the class action process by overly aggressive attorneys and sympathetic state judges have “undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution.”⁷² In response, the Class Action Fairness Act of 2005 was passed. Its stated purposes are to

- (1) assure fair and prompt recoveries for class members with legitimate claims;

68. Cameron Fredman, *Plaintiffs’ Paradise Lost: Diversity of Citizenship and Amount in Controversy under the Class Action Fairness Act of 2005*, 39 LOY. L. A. L. REV. 1025, 1028 (2006).

69. *Id.* (alteration in original) (quoting Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL’Y 235, 245 (2004)).

70. Schwartz et al., *supra* note 69, at 245.

71. Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 510 (2000).

72. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 5 (2005).

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.⁷³

In accordance with these purposes, CAFA outlines fundamental changes that are intended to further these purposes. A highly significant change implemented by CAFA is the expansion of federal diversity jurisdiction to ensure that cases that truly effect interstate commerce can be litigated in a federal court. However, there are local controversy exceptions (referred to as carve-outs) that allow cases with certain characteristics to remain in state court.⁷⁴

The procedure for removal was altered in a way that negated the ability of plaintiffs' lawyers to avoid federal jurisdiction by naming local defendants that have no true involvement in the claim or claiming damages less than the amount-in-controversy.⁷⁵ Additionally, appellate jurisdiction of remand decisions was modified.⁷⁶ Finally, a Consumer Bill of Rights was created that requires an increased judicial scrutiny of coupon and net loss settlements, bars increased compensation for class members located near the court, and requires notice of proposed class settlements to state and federal officials prior to final approval.⁷⁷ These reform efforts have effectively increased both the amount of class action lawsuits originally filed in federal district courts as well as the number of class actions that have been removed to federal court under diversity jurisdiction.⁷⁸

A. *Thwarting the "Judicial Hellholes" of State Courts by Expanding Federal Diversity Jurisdiction*

As discussed in Part II, the Supreme Court had determined that in order for a class action to be litigated in a federal court, there must be complete diversity, requiring all named class representatives and all defendants to be citizens of different states.⁷⁹ In addition, the

73. *Id.*

74. S. REP. NO. 109-14, at 27 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 27; see also Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1646-47 (2006).

75. S. REP. NO. 109-14, at 27.

76. *Id.* at 44.

77. *Id.* at 27.

78. Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CTR. 1 (Apr. 2008), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf).

79. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 365 (1921); *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806).

claims of class members could not be aggregated,⁸⁰ and at least one class member had to have claims exceeding \$75,000. Together, these requirements made it extremely difficult for most class action lawsuits to fulfill the federal diversity jurisdictional requirements.⁸¹

However, CAFA amended the diversity statute in order to ensure that cases that should be litigated in a federal court actually get into federal court. This expansion was achieved by adding an additional provision, Subsection (d), which is specifically applicable to interstate class actions filed under FRCP 23 or comparable state statutes. The provision abrogates the requirement for complete diversity and removes the limit on aggregation of the monetary values of the claims.⁸² Now, federal courts have original jurisdiction if a class has at least 100 members (named or not), maintains citizenship that is diverse from any one defendant, and has claims exceeding \$5 million in the aggregate.⁸³

However, even when these requirements have been met, the federal district court must still ensure that the class action does not fulfill the elements established in the local controversy or home state controversy exceptions, otherwise known as carve-outs, before it may choose to exercise federal jurisdiction.⁸⁴ In addition, defendants in actions that were initially filed in state court still have the right to remove the action to federal court if the action could have been originally filed in federal court.⁸⁵

B. “Carve-outs” from Federal Jurisdiction: the Exceptions That Allow Class Actions to Remain in State Court

Although § 1332(d)(2) did significantly expand the scope of federal diversity jurisdiction, there are still the carve-outs.⁸⁶ These

80. Zahn v. Int'l Paper Co., 414 U.S. 291, 296-97 (1973); Snyder v. Harris, 394 U.S. 332, 338 (1969).

81. See Scott L. Nelson, *The Class Action Fairness Act of 2005: An Analysis*, 2005 ABA Annual Meeting 3-4 (Aug. 4-7, 2005), http://www.classactionlitigation.com/aba_cafa_analysis.pdf.

82. 28 U.S.C. § 1332(d)(2) (2006) now reads as follows:

The district court shall have original jurisdiction of any civil action in which the *matter in controversy* exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

Id. (emphasis added).

83. *Id.* § 1441(a).

84. *Id.* § 1332(d)(3)-(4).

85. *Id.* § 1332(d)(2)-(5)(B).

86. Sherman, *supra* note 3, at 1596-97.

exceptions generally serve to ensure that certain types of cases remain in state court. There are both mandatory and permissive exceptions.⁸⁷ The mandatory exceptions apply to class actions that involve either a local controversy or home state controversy. The permissive exception is based upon the discretion of the federal district court, although the court is provided with statutorily-mandated criteria to utilize in its determination.⁸⁸

The local controversy exception provides that a federal court *must* decline jurisdiction if all of the following are met: (1) More than two-thirds of the proposed class come from the state “in which the action was . . . filed”; (2) “[A]t least 1 defendant . . . from whom significant relief is sought” is from “the State in which the action was . . . filed” and that defendant’s “conduct forms a significant basis for the claims asserted”; (3) The “principal injuries . . . were incurred in the State in which the action was originally filed”; and (4) No other class action was filed within three years asserting the same allegations.⁸⁹ Additionally, under the home state controversy exception, a federal court *must* decline jurisdiction if two-thirds or more of the class members and primary defendants are from the state in which the action was filed.⁹⁰

A federal district court may utilize the discretionary approach to decline to exercise jurisdiction over a class action if two elements are met. First, between one-third and two-thirds of all class members are citizens of the state in which the action was initially filed.⁹¹ Second, the primary defendants are citizens of the forum state.⁹² If both these elements are met, then the court may decline jurisdiction if it is “in the interests of justice and looking at the totality of the circumstances.”⁹³ The court’s determination regarding the interests of justice and the totality of circumstances involves the application of a six-factor balancing test that measures the extent of the local nature of the controversy and the appropriateness and effectiveness of applying federal jurisdiction.⁹⁴

Factor A questions whether the claims “involve matters of national or interstate interest.”⁹⁵ If answered affirmatively, the court should feel more inclined to exercise federal jurisdiction. Factor B considers whether the law to be applied to the claims is that of the

87. *See id.* at 1596-1603.

88. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 9-10 (2005).

89. 28 U.S.C. § 1332(d)(4)(A)(i)(I)-(II).

90. *Id.* § 1332(d)(4)(B).

91. *Id.* § 1332(d)(3).

92. *Id.*

93. *Id.*

94. *See id.*

95. *Id.* § 1332(d)(3)(A).

initial forum or of various other states.⁹⁶ The more local the law to be applied, the more likely it will be for the court to decline jurisdiction. Factor C questions whether the case was artfully pled to avoid federal jurisdiction, which is indicative of the drafters' intent to thwart plaintiffs' attorneys from doing this.⁹⁷ If the complaint was artfully pled in a way to avoid federal jurisdiction, the court should feel more inclined to exercise federal jurisdiction.⁹⁸

Factor D requires the court to look at any potential distinct nexus that may exist between the original forum state and the class members, alleged claims, or the defendants.⁹⁹ Factor E examines whether there are substantially more class members that reside in states other than the forum state and if they are widely dispersed throughout these additional states.¹⁰⁰ If the court finds that the members who are widely dispersed elsewhere outweigh the members in the forum, it is more of an interstate conflict and the court should choose to exercise federal jurisdiction.¹⁰¹ Lastly, Factor F questions whether a substantially similar claim or the same claim has been filed in the last three years, either by the same class members or others.¹⁰² If so, this would indicate a more widespread problem that should be handled by federal courts. There are several ambiguous aspects of each of these provisions governing when a federal court should, or may, choose to decline federal jurisdiction. They are further analyzed in Part IV.

C. *Easing the Restrictions on Removal*

Prior to the passage of CAFA, there were specific restrictions that applied if a defendant desired to remove a case from state to federal court. First, a defendant could not remove a case if the defendant was a resident of the state in which the claim was originally filed.¹⁰³ Additionally, if there were multiple defendants, all the defendants had to consent to removal in order for it to be proper.¹⁰⁴ Finally, Congress had issued an express, one-year time restriction on the removal of cases when the original jurisdiction would have been based on diversity, rather than a federal question.¹⁰⁵

96. *Id.* § 1332(d)(3)(B).

97. *Id.* § 1332(d)(3)(C).

98. Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1626 (2006).

99. 28 U.S.C. § 1332(d)(3)(D).

100. *Id.* § 1332(d)(3)(E).

101. See Sherman, *supra* note 3, at 1602.

102. 28 U.S.C. § 1332(d)(3)(F).

103. *Id.* § 1441(b).

104. Chi., Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 248 (1900).

105. 28 U.S.C. § 1446(b).

CAFA amended and essentially removed all three of these requirements, which had traditionally been barriers to federal jurisdiction for many class action cases. Now, the action may be removed “without regard to whether any defendant is a citizen of the State in which the action is brought,”¹⁰⁶ which effectively undercuts the past practice of plaintiffs’ attorneys who frequently would name a plaintiff or defendant in the action in order to avoid diversity jurisdiction. The defendant may remove a case without the consent of other defendants.¹⁰⁷ Additionally, the one-year time limitation on removal of claims based upon diversity jurisdiction is similarly no longer applicable.¹⁰⁸

D. Reconsidering Remand Orders and Expanding the Power of Appellate Courts

Prior to CAFA, a litigant had very little recourse, if any at all, to challenge a decision regarding removal from state to federal court. If a federal district court had retained jurisdiction upon removal, the decision was not permitted to be reviewed until the entire case had been adjudicated.¹⁰⁹ Moreover, if a federal court determined that removal was improper and remanded the case to state court, the remand order was barred from being reviewed on appeal.¹¹⁰ CAFA now provides access to appellate review. An order remanding a class action to state court may now be reviewed by appeal at the appellate court’s discretion.¹¹¹ There are statutorily-mandated timeframes within which this review must take place. These timing elements are discussed in further detail in Part IV.¹¹²

106. *Id.* § 1453(b).

107. *Id.*

108. *See id.*

109. *United States v. Rice*, 327 U.S. 742, 750 (1946); *Texas v. Real Parties in Interest*, 259 F.3d 387, 391 (5th Cir. 2001) (citing *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. 1981)).

110. 28 U.S.C. § 1447(d).

111. *Id.* § 1453(c).

112. *See infra* Part IV. The original text of 28 U.S.C. § 1453(c) read as follows:

(1) IN GENERAL.— Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) TIME PERIOD FOR JUDGMENT.— If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

Id. (amended 2009).

IV. INTERPRETATION OF AMBIGUOUS PROVISIONS

A. *Statutory Interpretation as it has Developed and a Brief Comparison of the Purposivist and Textualist Approaches.*

The field of statutory interpretation has substantially evolved from its early foundation of the Blackstonian vision of balancing law and equity into the modern legal process school that primarily focuses on statutory purpose.¹¹³ Judge Posner found Hart and Sacks' legal process framework to be a good starting point, but felt that it needed a dose of reality.¹¹⁴ Additionally, Judge Posner felt that the methodology of economics needed to be applied to the democratic marketplace of the legislature because legislators were frequently not "reasonable persons pursuing reasonable purposes reasonably" and statutes frequently do not embody broad public policy purposes.¹¹⁵ This realistic approach asserted that although statutes are frequently just the result of compromises made between lawmakers or special interest groups, if judges are given the discretion to completely disregard the statutory purpose, then there is the potential risk of attributing the judge's conception of the public interest rather than the purposes one can reasonably infer from the actual legislation.¹¹⁶ Judge Posner advocated for the concept of "imaginative reconstruction," which involves the judge attempting to put himself in the mindset of the enacting legislature, thus acting as the faithful agent of the enacting legislature by following the lines of the legislative compromise.¹¹⁷

However, Judge Easterbrook has consistently taken a more text-based approach that "[j]udges . . . carry out decisions they do not make."¹¹⁸ This perception of the honest agent concept rejects the idea that a judge must reconstruct the mindset of the enacting legislature and instead imposes a duty of "clear statement" on the legislature.¹¹⁹ In order to give proper deference to the legislature under the principle of separation of powers, Judge Easterbrook postured that "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be

113. See 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48A:3 (7th ed. 2007).

114. See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 819 (1983).

115. *Id.* at 819; see also Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986).

116. Posner, *supra* note 114, at 819.

117. *Id.* at 817.

118. Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984).

119. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544-45 (1983) (internal quotation and citation omitted).

restricted to cases anticipated by its framers and expressly resolved in the legislative process.”¹²⁰ Judges should only apply the law to an area where the law is intended to apply, and the plain meaning should be interpreted within the scope of the statute.¹²¹ In determining the scope of the statute, “[i]f the question of a statute’s domain may not often be resolved by reference to actual design, it may never properly be resolved by reference to imputed design.”¹²²

Perhaps the most well-known proponent of the textualism approach is Justice Scalia, whose plain meaning rule shares common characteristics with Judge Easterbrook’s clear statement principle. Justice Scalia has harshly criticized the Court’s past reliance on legislative history as an aid in interpreting statutes.¹²³ Instead, he argues that the Court should rely in most cases on a statute’s plain meaning, which can be derived from an ordinary understanding of the words and structure of statutory text.¹²⁴ “[C]ontext is everything” when interpreting a statute; one should consider the words in the statute,¹²⁵ how a statute operates in the bill, the structure of the statute, the common usage of the grammar and syntax, and the dictionary meaning behind the words in a statute. Therefore, Justice Scalia will consult certain extrinsic sources beyond the statutory text.

Justice Scalia has firmly established his view that legislative intent is not, as many others argue, the dispositive key to statutory interpretation.¹²⁶ His approach to statutory interpretation rests primarily on his perception of the structure of our government, particularly the separation of powers principle, which ensures that duties remain with the proper branch of government pursuant to the Constitution.¹²⁷ Justice Scalia is a devout proponent of the concept that, based on the Constitutional provisions of bicameralism and presentment, the plain language of enacted legislation should be the controlling authority, because only the text is the law.¹²⁸

Justice Scalia’s objection to the use of legislative history in statutory interpretation is partially based on his doubt that it holds true evidentiary value, because he does not consider legislative history to be sufficiently reliable.¹²⁹ Yet another significant qualm

120. *Id.* at 544.

121. *Id.* at 535-36.

122. *Id.* at 537.

123. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 22-23 (Amy Gutmann et al. eds., 1997).

124. See *id.* at 29-30.

125. See *id.* at 37.

126. *Id.* at 32-36.

127. *Id.* at 35.

128. See *id.*

129. See *id.* at 32-34.

that he has with its use is that judges cannot be trusted with absolute discretion to utilize this sort of material.¹³⁰ Given the abundance of legislative history and the absence of a reliable way to infer actual legislative intent from those materials, he believes that judges will end up using legislative history selectively.¹³¹ Reliance on legislative history thus leads to judicial subjectivism.¹³² According to Justice Scalia, “[w]e use them [(committee reports)] when it is convenient, and ignore them when it is not,”¹³³ and it is “dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor” when relying on legislative history.¹³⁴

In opposition to the textualist approach, there is another school of thought, purposivism, which has garnered a significant amount of support. Professor Farber, a well-known purposivist, would advocate for a more synthesized approach that incorporates the legislative history of CAFA to determine both the areas addressed in ambiguous terms, as well as those that were not addressed at all.¹³⁵ As the name indicates, supporters of this type of interpretation believe that extrinsic sources must be consulted to ascertain the enacting legislature’s purpose. For instance, Professor Farber has asserted that the honest agent theory oversimplifies the agency model, because it does not take into account that agents act on their principals’ behalf rather than just robotically executing orders.¹³⁶ Additionally, he asserted that another flaw is that federal judges are not the agents of Congress but of the United States.¹³⁷ Therefore, “their ultimate allegiance is to the Constitution,” and “it is the courts’ role to carry out congressional directives in light of their understanding of [those duties mandated by] the Constitution.”¹³⁸ Professor Farber also pointed out that although the supremacy principle does dictate that the judiciary must pay deference to the legislature, it does not automatically situate the judiciary in a subordinate position.¹³⁹

Clearly, these approaches have significant differentiating characteristics and both have garnered praise and criticism. From

130. *See id.* at 34.

131. *Id.* at 35-36.

132. *Id.*

133. Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573, 580 (1996) (second alteration in original) (quoting *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring)).

134. *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring).

135. *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 286 (1989).

136. *Id.* at 284.

137. *Id.*

138. *Id.*

139. *Id.* at 318.

the Supreme Court to the lower courts, it is evident that judges have taken different approaches to comparable situations. This is evident from the way courts have addressed the ambiguous provisions of CAFA thus far. The resulting inconsistent applications of CAFA should motivate Congress to enact corrective legislation.

B. Applying Both Approaches to CAFA's Silence on the Burden of Proof for Federal Jurisdiction and How Textualism Prevails

The question under CAFA of whether the burden of proving federal jurisdiction is on the removing party or on the party advocating for remand has incited the most significant amount of judicial interpretation concerns. CAFA does not contain a provision that explicitly changes the long-standing common law rule that the party seeking removal has the burden of proving federal jurisdiction. However, there were unequivocal and numerous references in the House Sponsors' Statement and the Senate Judiciary Committee Report that indicated the drafter's intent to shift the burden to the plaintiff objecting to removal to demonstrate that the jurisdictional requirements had not been met.¹⁴⁰ The Chairman of the House Committee on the Judiciary, Representative F. James Sensenbrenner, inserted the House Sponsors' Statement into the congressional record, which read in part that "if a purported class action is removed under these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improper."¹⁴¹ However, the House Sponsors' Statement was not inserted into the congressional record until after CAFA had been enacted.¹⁴²

Moreover, placing the burden on the party objecting to removal would be consistent with CAFA's intent to broaden federal diversity jurisdiction, because a class action would presumptively remain in federal court unless the objecting party could make an affirmative showing that the case should be remanded.¹⁴³ The Senate Report expressed a similar sentiment by including the following statement:

If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied). And if a federal court is uncertain about whether "all matters in controversy" in a purported class action "do not in the aggregate

140. 151 CONG. REC. H727 (daily ed. Feb. 17, 2005); *see also* S. REP. NO. 109-14, at 42-44 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 40-42.

141. 151 CONG. REC. H727 (daily ed. Feb. 17, 2005).

142. Jeffrey L. Roether, *Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 FORDHAM L. REV. 2745, 2764 (2007).

143. *Id.* at 2763.

exceed the sum or value of \$5,000,000,” the court should err in favor of exercising jurisdiction over the case.¹⁴⁴

Several federal courts have determined that there was a sufficient amount of legislative intent expressed in the legislative reports to justify abrogating the common law rule, thus requiring the party objecting to removal to bear the burden.¹⁴⁵ These courts generally held that under CAFA, the burden of removal is on the party opposing removal to prove that remand is appropriate.¹⁴⁶ This determination was based on the numerous statements made by the drafters by CAFA, along with the committee reports that accompanied the Senate bill, which those courts interpreted as indication of a desire to deviate from the common law rule. Furthermore, the court in *Berry v. American Express Publishing Corporation* held that this departure from common law tradition furthers the stated purpose of CAFA to expand the scope of federal diversity jurisdiction.¹⁴⁷

Subsequent to these decisions, however, several appellate courts and federal district courts have been openly critical of the practice utilized by the earlier courts and labeled them as acting outside the bounds of judicial authority.¹⁴⁸ For example, the Second Circuit pointed out that “it would be thoroughly unsound . . . to reject a longstanding rule absent an explicit directive from Congress. We presume that Congress, when it enacted CAFA, knew where the burden of proof had traditionally been placed. By its silence, we

144. S. REP. NO. 109-14, at 42.

145. See, e.g., *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 168 (D. Mass. 2005) (maintaining that under CAFA, the party seeking remand bears burden of proof that federal jurisdiction does not exist); *Waitt v. Merck & Co.*, No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005) (determining that CAFA's legislative history effectively shifted responsibility to prove the impropriety of removal on the party seeking remand); see also, e.g., *Berry v. Am. Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1122-23 (C.D. Cal. 2005) (noting that pre-CAFA diversity jurisdiction statute is void of language regarding allocation of burden of proof on remand).

146. *Berry*, 381 F. Supp. 2d at 1121-23 (Holding that, with respect to CAFA, “the Committee Report expresses a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court.” (emphasis added)). The court also noted that the report “states that ‘[i]t is the Committee’s intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption.’” *Id.* (citing S. REP. NO. 109-14, at 44).

147. *Berry*, 381 F. Supp. 2d at 1121.

148. *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271, 275 (2d Cir. 2006) (concluding that Congress’s silence regarding burden of proof failed to alter traditional rule); see also *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (holding that the removing party continues to bear the burden of establishing federal jurisdiction on remand motion and implicitly overruling district court decisions in *Waitt* and *Berry*); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (noting that none of CAFA's language “is even arguably relevant” to this burden-shifting argument); *Moniz v. Bayer A.G.*, 447 F. Supp. 2d 31, 34 (D. Mass. 2006) (rejecting proffered argument to shift burden of proof because *Abrego Abrego* implicitly overruled *Natale*).

conclude that Congress chose not to alter that rule.”¹⁴⁹ The Ninth Circuit additionally held that this silence regarding the burden issue creates a presumption that Congress was aware of the legal context in which it was legislating.¹⁵⁰ The legal context at the time the 109th Congress passed CAFA into law featured a longstanding, near-canonical rule that the burden on removal rested with the removing defendant.¹⁵¹

Had the drafters wanted the burden of proof to shift, they would have explicitly included such a provision within the text of CAFA so that it would be uniformly accepted by class action practitioners and uniformly applied by the judiciary. Courts should not now defer to the legislative history when, as Judge “Easterbrook argued[,] legislatures cannot have intents or purposes.”¹⁵² Legislatures “have ‘only outcomes,’ not ‘intents’ or ‘designs.’”¹⁵³

Furthermore, many courts and legal commentators have asserted that ambiguous language rather than mere silence in statutory text is required in order to resort to legislative history. The Ninth Circuit explained that the consideration of legislative history can only be appropriate where statutory language is ambiguous, because that is a necessary condition before interpretation should occur.¹⁵⁴

Professor Eskridge advocates for a more active approach and has developed a unique precept of the legislative supremacy principle that involves three central themes: (1) “under any rigorous theory of statutory interpretation, legislative supremacy not only tolerates, but requires judges to” look beyond the statutory text and consider applicable situations “not contemplated by the original drafters”; (2) the assumptions upon which “the countermajoritarian difficulty with statutory interpretation” rest are generally controversial and may benefit from further questioning; and (3) the nature of interpretation

149. *DiTolla*, 469 F.3d at 275 (citation omitted).

150. *Abrego Abrego*, 443 F.3d at 684; *see, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-97 (1979) (“It is always appropriate to assume that our elected representatives, like other citizens, know the law”); *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991) (“Congress is, of course, presumed to know existing law pertinent to any new legislation it enacts.”).

151. *See, e.g.*, *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 402 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992).

152. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 252 (1992) (Easterbrook, *supra* note 119, at 547-48).

153. *Id.* at 253 (quoting Easterbrook, *supra* note 119, at 547).

154. *See Abrego Abrego*, 443 F.3d at 683-84; *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”); *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) (“Resort to legislative history is only justified where the face of the Act is inescapably ambiguous”) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring)).

outweighs the importance of legislative supremacy in order to create a bridge between the past and present meanings.¹⁵⁵ Here, Professor Eskridge would apply his precept by looking beyond the silence in CAFA regarding the jurisdictional burden to examine the supporting documentation, make note of the stated intentions of the drafters to shift the burden, and likely conclude that the common law tradition had been usurped.

However, the numerous courts that have refused to abrogate the common law tradition regarding the burden of proof for removal proceedings do so pursuant to the canon of interpretation that “statutes in derogation of the common law should be strictly construed.”¹⁵⁶ Professor Shapiro explicates that this canon conforms to a desirable “judicial tendency to favor continuity over change.”¹⁵⁷ Additionally, his discussion regarding the merits of the canon posits that it should be viewed as “an analog to the more favorably viewed presumption against implied repeal of an existing statute.”¹⁵⁸ This favorable view of the canon is especially valid in the context of such a long-standing common law tradition as the one allocating the burden of proof for removal, which has been utilized by practitioners and the judiciary for a countless number of years.

In his criticism of the general deference paid by courts to legislative history, Judge Easterbrook has explained:

[W]hen the legislative history stands by itself, as a naked expression of “intent” unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence. . . .
 . . . [N]aked legislative history has no legal effect The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time. To change such a rule, Congress must enact a statute with the President’s signature (or by a two-thirds majority to override a veto). A declaration by 13 Senators will not serve.¹⁵⁹

Although both Professors Farber and Eskridge make valid points, Judge Easterbrook’s position exposes a flaw in the purposivist argument, which provided the basis for the decisions of the earlier

155. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 322 (1989).

156. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (discussing the role that canons play in the process of statutory construction).

157. *Id.*

158. *Id.* at 937.

159. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005).

judicially active courts. The purposivist approach may promote the advantages of using legislative history in statutory interpretation, but to rely on the statements included in the Senate Report would essentially allow the authority of an “opinion poll of legislators” to abrogate common law rule. Judge Easterbrook’s discussion makes it apparent that courts should continue to focus on the clear statement in the statutory text. Here, the text is silent. Thus, without an explicit statutory directive, it is reckless for the judiciary to take an active role; courts should continue to defer to the long-standing tradition of placing the burden on the party seeking federal jurisdiction.

However, the disparity between the statutory language of CAFA and the relevant legislative history does indicate a desire, by at least some members of Congress, to change this tradition. This significant ambiguity has resulted in differing judicial interpretations of the jurisdictional provisions.¹⁶⁰ A corrective measure by Congress to specifically allocate the burden of proof would alleviate this dilemma. Courts would then be able to consistently apply and utilize CAFA’s provisions in order to further the stated purposes articulated by Congress.

C. Easing the Restrictions on Removal

Although CAFA did expand the scope of federal diversity, the carve-outs described in Part III allow certain types of class actions to remain in state court. Thresholds within the local controversy and home-state controversy exceptions either require or allow federal courts to decline exercising federal jurisdiction. Whether mandatory or permissive, there are ambiguous requirements, legal terms, and recommended criteria within all of the exceptions that have led to a significant amount of dispute and interpretation.

The most prominent example of an ambiguous legal term is the reference to “primary defendants” in both the statute governing mandatory abstention¹⁶¹ and the statute governing when a federal court is permitted to decline jurisdiction.¹⁶² The term primary defendant was not explicitly defined in CAFA. However, the legislative history describes the primary defendants as the “real ‘targets’ of the lawsuit” (the individuals expected to incur the

160. *Berry*, 381 F. Supp. 2d at 1121-23 (Holding that, with respect to CAFA, “the Committee Report expresses a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court.” (emphasis added)). *But see* DiTolla v. Doral Dental IPA of N.Y., LLC, 469 F.3d 271, 275 (2d Cir. 2006) (concluding that Congress’s silence regarding burden of proof failed to alter traditional rule). *See also* Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (noting that none of CAFA’s language “is even arguably relevant” to this burden-shifting argument).

161. 28 U.S.C. § 1332(d)(4) (2006).

162. *Id.* § 1332(d)(3).

majority of the loss) and as any defendant that would be liable to a majority of the class.¹⁶³ Contrarily, there is nearly a complete dearth of information regarding the meaning of a “significant defendant.”

According to one legal commentator, there are four potential definitions of

“primary defendant”: (1) a defendant against whom significant relief is sought; (2) a defendant whose alleged conduct forms a significant basis for the claims asserted; (3) a defendant characterized by both significant relief *and* significant culpable conduct . . . ; or (4) a defendant characterized by either significant relief *or* significant culpable conduct.¹⁶⁴

One court has found that a defendant was deemed primary when the whole class sought significant injunctive relief from him, even though he was a target of only one of eight plaintiffs’ claims.¹⁶⁵ “The Oxford English Dictionary defines ‘primary’ as ‘[o]f the first or highest rank or importance,’ ” which implies that among many multiple defendants, there would be one who ranks as “primary” and all others would not.¹⁶⁶ A modern textualist like Justice Scalia would be willing to consult such an objective resource in order to reach the most reasonable construction of the text.¹⁶⁷

However, one district court has focused more on the defendant’s alleged conduct, rather than on whether the defendant is the one against whom the majority of the relief was sought, in determining the application of the term “primary defendant.”¹⁶⁸ This court’s application of the term would fall within the second definition. The third definition, requiring both significant relief sought and direct liability, may result in no defendants being designated primary, which is not workable.¹⁶⁹ The fourth definition appears to be a rational compromise, which allows the designation if either significant relief or direct liability is satisfied.¹⁷⁰

The plain language of these provisions in CAFA does not provide much guidance for determining where the line is drawn between primary, significant, and the remaining defendants in a class action. Beyond the statutory text, there is no further instruction to be

163. S. REP. NO. 109-14, at 43 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 41; Vance, *supra* note 98, at 1623.

164. Fredman, *supra* note 68, at 1043-44.

165. Hangarter v. Paul Revere Life Ins. Co., No. C 05-04558 WHA, 2006 WL 213834, at *3 (N.D. Cal. Jan. 26, 2006).

166. Fredman, *supra* note 68, at 1042 (alteration in original) (quoting 12 OXFORD ENGLISH DICTIONARY 472 (2d ed. 1989)).

167. See Scalia, *supra* note 123, at 23.

168. Adams v. Fed. Materials Co., No. Civ. A. 5:05CV-90-R, 2005 WL 1862378, at *5 (W.D. Ky. July 28, 2005).

169. Fredman, *supra* note 68, at 1047.

170. *Id.* at 1047-48.

garnered from the legislative history, which at least serves to alleviate a potential debate between textualists and purposivists regarding whether to utilize the legislative history. Regardless of the ambiguities that exist due to the legislative history, Judge Easterbrook correctly noted that “[w]e interpret texts. The invocation of disembodied purposes, reasons cut loose from language, is a sure way to frustrate rather than implement these texts.”¹⁷¹ Therefore, this area of CAFA would greatly benefit from a corrective measure by Congress to specifically delineate the requirements and thresholds for both a primary and significant defendant.

D. The Scrivener’s Error for Appellate Review of a Remand Decision That Congress Fixed Without Judicial Interpretation

Another significant change to class action procedure effectuated by CAFA is its provision allowing for immediate review of jurisdictional decisions; more specifically, it changed the determination as to whether a case may be removed from state to federal court. When a decision is made to remove a case or to deny removal and remand the case to state court, CAFA authorizes review of the decision, but only “if application is made to the court of appeals *not less than 7 days* after entry of the order.”¹⁷² The wording of this requisite time limit resulted in a significant amount of controversy and litigation. There is an unprecedented amount of legislative history that indicates the drafters of CAFA intended for there to be a seven-day deadline to promote judicial efficiency, rather than the seven-day waiting period, which resulted from the language that was actually enacted.¹⁷³

For instance, when CAFA was being considered by the Senate Committee, a report was issued describing the reasoning for allowing

171. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986).

172. 28 U.S.C. § 1453(c)(1) (2006) (emphasis added) (amended 2009). The actual text of this provision as originally enacted was as follows:

(c) REVIEW OF REMAND ORDERS.—

(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals *not less than 7 days* after entry of the order.

(2) TIME PERIOD FOR JUDGMENT.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

Id. § 1453(c)(1), (2) (emphasis added).

173. Adam N. Steinman, “*Less*” is “*More*”? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act’s Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1212-13 (2007).

appellate review of removal decisions. It was noted that one purpose of the provision was “‘to develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions.’”¹⁷⁴ The Committee went on to describe the imposition of time limits on such review. In fact, the report stipulated that the “[n]ew subsection 1453(c) provides discretionary appellate review [of remand orders under this legislation] but also imposes time limits. Specifically, parties must file a notice of appeal *within seven days* after entry of a remand order.”¹⁷⁵ Additionally, the appeals court shall issue a final decision on the appeal within 60 days.¹⁷⁶ However, if the parties agree, they may extend the time limit; or the court may, on its own, grant an extension of no more than ten days.¹⁷⁷

Courts differed on how to apply the actual provision allowing for appeals when the application to review was made “*not less* than seven days after entry of the order.”¹⁷⁸ The Tenth Circuit was the first court to deal with the issue of how to interpret the “*not less than 7 days*.”¹⁷⁹ After reviewing the Senate Report that explicitly stated the drafters intended to impose a seven-day limit on applications for review, the court concluded that the seven-day provision was a scrivener’s error and the provision was intended to impose a seven-day deadline rather than the waiting period as written.¹⁸⁰ This holding completely went against the plain text of the statute, although Judge Ebel of the Tenth Circuit reasoned that such a deviation was permissible in situations where a “‘literal application of the statute [would] produce a result demonstrably at odds with the intentions of its drafters.’”¹⁸¹

The Eleventh Circuit also adopted the same approach as the Tenth Circuit by finding that a literal reading of CAFA’s appellate provision “‘would produce an absurd result.’”¹⁸² The Third Circuit in *Morgan v. Gay* also concurred with the decision in *Pritchett* by referring to the legislative history and determining that to rule that the provision required a seven-day waiting period would, in fact, allow the parties to potentially abuse the system by strategically waiting to appeal the remand decision and delay the case for a greater amount of time than necessary.¹⁸³ The Ninth Circuit agreed

174. *Id.* at 1195 (alteration in original) (quoting S. REP. NO. 109-14, at 49 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 46).

175. *Id.* at 1195 (quoting S. REP. NO. 109-14, at 49).

176. § 1453(c)(2).

177. *Id.* § 1453(c)(3).

178. Steinman, *supra* 173, at 1196.

179. *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005).

180. *Id.* at 1093 n.2.

181. *Id.* at 1093 (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)).

182. Steinman, *supra* note 173, at 1199 (quoting *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006)).

183. *Morgan v. Gay*, 466 F.3d 276, 278 (3rd Cir. 2006).

with this approach although a large number of dissenters to the *sua sponte* call for *en banc* rehearing of the case argued that the “scrivener’s error” exception should not have applied in that case.¹⁸⁴ Those on the panel who advocated a *correctionist* approach did concede they were not taking part in interpretation per se, but rather were replacing terms in the statutory text altogether in order to comport with the legislative intent and ensure that otherwise absurd results did not occur.¹⁸⁵

The dissenters on the Ninth Circuit wrote a lengthy criticism of the stance taken by those *correctionists* who chose to ignore “the supremacy of the legislature.”¹⁸⁶ Specifically, Judge Bybee stated that the panel chose to ignore the plain meaning of the text in order to substitute legislative history, which was an abuse of “judicial power,” and that interpretative aids should not be utilized when the language is plain and ambiguous as was CAFA’s provision outlining a timeframe for appeals.¹⁸⁷ Judge Bybee was additionally concerned about this practice, because such a sharp deviation from the language of the law would essentially result in depriving citizens of knowing the law on which they may rely in conducting their affairs so that they will not engage in unlawful conduct.¹⁸⁸ Although Judge Bybee and others—who have advocated strict adherence to the plain text of the CAFA provision¹⁸⁹—provided a valid basis for their approach, even strict textualists, such as Justice Scalia, permit interpretation to a certain extent by applying the absurdity doctrine or scrivener’s error exceptions in rare circumstances similar to that which resulted from applying the CAFA provision as it was written.¹⁹⁰

In 2009, Congress responded to the controversy, conflicting judicial decisions, and criticism by academic legal commentators by amending this provision.¹⁹¹ The 2009 amendment struck out “not less than 7 days” and inserted “not more than 10 days”¹⁹² to fully comport with the legislative history that had indicated an intent to limit applications for review to a short period of time. This puts to rest the issue of which interpretative method to utilize in order to effectively

184. *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1097 (9th Cir. 2006) (Bybee, J., dissenting).

185. *See Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir.), *reh’g en banc denied*, 448 F.3d 1092.

186. *Amalgamated*, 448 F.3d at 1099 (Bybee, J., dissenting).

187. *Id.* at 1094-96.

188. *Id.* at 1100.

189. *Id.* at 1095-96.

190. Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 145-46 (2009) (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring)).

191. Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6(2), 123 Stat. 1607, 1608.

192. *Id.*

apply this time limit and demonstrates that courts do not need to look beyond the text interpreting a statute, because Congress can uniformly resolve an ambiguity with a corrective amendment.

V. CONCLUSION

In order for courts to fulfill Congress's stated purposes behind the Class Action Fairness Act of 2005 of fairness and efficiency, they need to receive proper guidance through clear and unambiguous statutory language. Although it may be impossible to conceive of a legislative reform of this magnitude without ambiguities arising, there are corrective measures that should be taken by Congress to provide greater clarity. These include amending the diversity jurisdiction statute to specifically place the burden of proof for federal diversity jurisdiction on either the removing party or the party seeking remand to state court. Furthermore, the terminology utilized in the exceptions to the expansion of federal jurisdiction, specifically the references to primary defendants, should be legislatively clarified. Finally, courts must be provided with definitive criteria regarding their duty in determining whether a settlement is "fair, reasonable, and adequate," along with what the term "coupon" encompasses in order to comply with CAFA's intent to prevent the abusive practices of unscrupulous attorneys. Beyond these areas of ambiguity that require legislative clarification, CAFA has been moderately successful thus far in expanding federal diversity jurisdiction in an effort to make class action litigation more consistent, equitable, and efficient.